Supreme Court, U.S.
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No. _____

In The

Supreme Court of the United States

October Term, 1996

HUGH FOSTER,

Petitioner,

versus

INTERNATIONAL BUSINESS MACHINES CORPORATION, DENNY SLAYTON

Respondents.

Petition for A Writ Of Certiorari to the United States Court of Appeals for the Fifth Circuit

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QUESTIONS PRESENTED FOR REVIEW

Louisiana Revised Statute (La. Rev. Stat.) 23:1006 *et seq. and* La. Rev. Stat. 51:2242 prohibit employment related discrimination based on, among other illegal reasons, race and/or national origin. The statutes in question afford a worker in the state of Louisiana the legal right to file a lawsuit in the appropriate state district court against his/her employer for any acts of illegal discrimination.

This case presents the question of whether, in view of an unresolved question of Louisiana state law, the United States Fifth Circuit Court of Appeals should have certified a question concerning when prescription commences to run in such a case to the Louisiana Supreme Court for resolution.

This case also presents the Peti-

tioner's request under Rule XII of the **Louisiana Supreme Court Rules** for certification of the following unresolved question of Louisiana law to the Louisiana Supreme Court for resolution by this Honorable Court:

> At what point does the one year prescriptive period commence to run in a race discrimination case filed under La. Rev. Stat. 23:1006 *et seq.* *and* La. Rev. Stat. 51:2242?

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No. _____

In The

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October Term, 1996

HUGH FOSTER,

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versus

INTERNATIONAL BUSINESS MACHINES CORPORATION, DENNY SLAYTON

Respondents.

Petition for A Writ Of Certiorari to the United States Court of Appeals for the Fifth Circuit

---

Petitioner Hugh Foster respectfully prays that this Honorable Court issue a writ of certiorari to review the November 21, 1996 Judgment and opinion of the United States Court of Appeals for the Fifth Circuit affirming the dismissal of his employment discrimination under **Louisiana Revised Statute** (**La. Rev. Stats.**) 23:1006 (B) (1) and 51:2242 and/or certify an unresolved question of Louisiana law to the Louisiana Supreme Court for review.

OPINIONS DELIVERED IN THE COURT BELOW

On November 21, 1996, the Fifth Circuit Court of Appeals under number 96-30481 affirmed the dismissal of Mr. Foster's case by the Federal District Court for the Eastern District of Louisiana under Federal Rule of Civil Procedure 12 (b) (6). The decision is

reprinted in Appendix "A."

The Ruling of the United States District Court for the Estern District of Louisiana is reprinted in Appendix "B."

STATEMENT OF THE GROUNDS ON WHICH THE JURISDICTION OF THE COURT IS INVOKED

In this petition, Hugh Foster seeks review of the November 21, 1996 Judgment of the United States Court of Appeals for the Fifth Circuit which affirmed the Rule 12 (b) (6) dismissal of his removed, diversity-based employment discrimination case filed under Louisiana state law. Accordingly, this Court has jurisdiction over this matter pursuant to **United States Supreme Court Rule** 28 U. S. C. §2101.

In addition, and/or in the alternative, Petitioner seeks certification of a question of unresolved Louisiana law to the Louisiana Supreme

Court for its resolution under Rule XII of the **Rules of the Louisiana Supreme Court.**

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Federal Rule of Civil Procedure 12(b) (6) provides:

> (b) **How Presented.** Every defense, in law or fact, to a claim for relief in any pleading, whether a claim, counter-claim, cross-claim, or third-party claim, shall be asserted in the responsive pleading thereto, if one is required, except that the following defenses may at the option of the pleader be made by motion: ... (6) failure to state a claim upon which relief can be granted ... A motion making any of these defenses shall be made before pleading if a further pleading is permitted.

Louisiana Revised Stature 23: 23:1006 provides in pertinent part:

> B. It shall be unlawful

discrimination in employment for an employer to:

(1) Intentionally fail or refuse to hire, refer, discharge, or to otherwise intentionally discriminate against or in favor of an individual with respect to compensation terms, conditions, or privileges of employment, because of race, color, religion, sex or national origin. ...

D. A plaintiff who has a cause of action against an employer for discrimination in employment may file suit in the district court for the parish in which the alleged discrimination occurred seeking general or compensatory damages, back pay, restoration of employment, related benefits, reasonable attorney's fees and court costs. ...

Louisiana Revised Stature 51:2242 states:

It shall be a discriminatory practice for an employer:

(1) to fail, to refuse to hire or to discharge any person or otherwise discriminate against an individual with respect to compensation, terms, conditions or privileges of

employment because of the individual's race, creed, color, religion, sex, age, disability, as defined in R.S. 51:2232(1), or national origin.

Rule XII of the **Louisiana Supreme Court Rules** provides in pertinent part:

RULE XII CERTIFIED QUESTIONS FROM FEDERAL COURT

Section 1. When it appears to the Supreme Court of the United States, or to any circuit court of appeal of the United States, that there are involved in any proceedings before it questions or propositions of law of this state which are determinative of said cause independently of any other questions involved in said case and that there are no clear controlling precedents in the decisions of the supreme court of this state, such federal court before rendering a decision may certify such questions or propositions of law of this state to the Supreme Court of Louisiana for rendition of a judgment or opinion concerning such questions or propositions of Louisiana law. This Court may, in its discretion, decline to

answer the question certified to it.

Section 2. The provisions of this rule may be invoked by the Supreme Court of the United States or any circuit court of appeal of the Untied States upon its own motion or upon the suggestion or motion of any interested party.

Section 3. The certificate provided for herein shall contain the style of the case, a statment of facts, showing the nature of the cause and the circumstances out of which the question or propositions of law arise, and the question or questions of law to be answered.

Section 4. The certificate may be prepared by stipulation or as directed by such certifying court. When prepared and signed by the Chief Justice of the United States Supreme Court or by the presiding judge of the court of appeal of the United States, whichever be the certifying court, it shall be certified to the Supreme Court of this state by the clerk of the certifying court under its official seal. The original or copies of any portion of the record before the certifying court, as it may director as either party may request, shall be filed with said certificate. If all of the record has not

> been filed, the Supreme Court of Louisiana may in its discretion order that all or any portion of the remaining record be filed with a proper certificate as herein described. . . .

STATEMENT OF THE CASE

A. Course of proceedings and disposition in the courts below[1]

Mr. Foster's petiton for damages was filed in Civil District Court for the Parish of Orleans in New Orleans, Louisiana under the provisions of **La. Rev.Stats.** 23:1006 *et seq.* and 51:2242, which is the Louisiana anti discrimination statutes prohibiting discriminatory treatment in employment based on race and/or national origin and **Louisiana**

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[1] All references to the one volune district court record herein are cited as "R., p __"

Civil Code Article 2315. Following service of Mr. Foster's suit, the Defendants removed the matter to Federal District Court for the Eastern District of Louisiana.(R., pp.162-166)

International Business Machines Corporation (IBM) and Denny Slayton then moved for a dismissal of the matter under the provisions of Rule 12(b)(6) of the **Federal Rules of Civil Procedure**. (R., pp. 147-154) to which Mr. Foster objected. (R., pp.117-122) By Judgment entered on December 15, 1995, the district court granted the motion in favor of IBM, dismissing Mr. Foster's case. (R., p. 101)

A Motion for Reconsideration and/or New trial was subsequently filed by Petitioner (R., pp. 43-47) and the district court allowed Mr. Foster the opportunity to amend his petition by judgment entered on January 30, 1996.

(R., pp. 76-78) Mr. Foster then did so. (R., pp. 58-60) Following this action by Mr. Foster, IBM filed a second Motion to Dismiss (R., pp. 43-54) to which the Petitioner filed a written memorandum in opposition.(R. pp. 27-31)

Without oral argument, the district court again granted the motion and dismissed the Petitioner's case by Judgment entered on April 23, 1996. (R., pp. 6, 8-16)

On May 3, 1996, a Notice for Appeal was filed on behalf of Mr. Foster (R., pp. 2-3) and in accordance with the Fifth Circuit's order and extension thereto, Mr. Foster was given until July 22, 1996 (since July 21, 1966 was a Sunday) to file his brief on appeal. Said brief was timely filed.

On November 21, 1997, the United States Court of Appeals for the Fifth Circuit affirmed the district court's

dismissal of Petitioner's case.

Mr. Foster now files this Application for a Writ of Certiorari with this Honorable Court in a timely manner, having been granted an extension until February 26, 1997 for the reason set forth in detail in the written Request for Extension filed on February 19, 1997.

In addition, and/or in the alternative, Petitioner seeks the certification by the Honorable Court of an unresolved question of Louisiana law to the Louisiana Supreme Court in accordance with the provisions of **Louisiana Supreme Court Rule** XII.

B. Statement of Facts relevant to the questions presented

Since this matter arose from a Rule 12 (b) (6) dismissal, the following facts

must be accepted as true and viewed in the light most favorable to Hugh Foster with all inferences drawn in his favor. As set forth in the Petition filed in this matter:

> 1.
>
> Mr. Foster is a black man over the age of forty who was born and raised in Barbados.[2]
>
> 2.
>
> International Business Machines Corporation (hereinafter frequently referred to as "IBM"), the defendant herein, is a foreign corporation licensed to do and doing business within the State of Louisiana, Parish of Orleans. At all material times mentioned herein, IBM was the employer of Denny Slayton and, as such, is responsible for his actions under the theory of *respondeat superior*.
>
> 3.
>
> Denny Slayton ("Slayton"), is a person of the full age of

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[2] Paragraphs 1 through 15, exclusive of the subparts to paragraph 14, are contained in the original petition located at R., pp.167-169)

majority domiciled in Baton Rouge, Louisiana and a defendant herein, who at all material times herein was employed by IBM and held the position as Plaintiff's Branch Manager at IBM.

4.

IBM is an employer, as defined in L.R.S. 23:1106 (A) (1) and qualifies to be governed by the provisions of L.R.S. 23:1006 *et seq*.

5.

Plaintiff was hired by IBM and employed with the company for over thirty (30) years, including during all periods of time relative to the actions that form the basis of this suit. Plaintiff worked for IBM in New Orleans from 1980 through November of 1994 in the position of field manager.

6.

Plaintiff was the only black field manager employed at the IBM facilities in Louisiana and the entire region. Plaintiff was under the supervision of Branch Manager Denny Slayton and performed his duties as a field manager in a competent and businesslike manner receiving numerous merit pay raises over the years.

7.

In 1993, Plaintiff was of-

fered the option of early retirement by IBM which he declined.

8.

In 1994, Plaintiff was advised that he would no longer be a field manager, but would be transferred to maintenance marketing, a position that involved selling maintenance on a quota basis at an executive level, a task for which he had no previous experience or expertise. Plaintiff, a 30 year employee with IBM, requested to retain his position of field manager, but was refused by defendants.

9.

The defendants' actions in demoting Plaintfiff from the position of field manager, were contrary to the procedure followed with other field managers in the New Orleans/Baton Rouge office in that: as the number of IBM employees was reduced, so were the number of field managers. Former IBM employees were reassigned to other IBM companies and field manager groups were combined. The field manager having the most employees in the combined group became manager of that group. According to the procedure followed in every other case in the New Orleans/Baton Rouge office, Plaintiff would have assumed responsibility for the one employee left in the Baton

Rouge field manager's group. Instead, the eight employees left in the Plaintiff's group were reassigned to a Baton Rouge field manager who is a caucasian.

10.

In January of 1994, Plaintiff learned that he was no longer considered a manager by defendants and could no longer attend management meetings.

11.

From the time of his demotion in January 1994 until his release by defendants, Plaintiff was assigned several ill defined positions for which he requested training and direction. Plaintiff never received any meaningful training relative to these newly assigned positions, despite his request.

12.

This action was taken by the defendants in a concerted effort to discourage Pliantiff and bring about his resignation.

13.

Plaintiff did not resign but continued in employment with IBM and requested directions and training in the positions to which he was assigned.

14.

On or about September 22, 1994, Plaintiff was advised that he would "be surplussed" from IBM. Plaintiff's last day of work was November 30, 1994.

14(A)[3]

Mr. Foster received a letter from Defendant IBM dated September 22, 1994 advising him information set forth in paragraph 14 along with the fact that "internal placement activities may be undertaken." A copy of said letter is attached hereto as "Exhibit A". (It has been included in the Appendix of this brief)

14(B)

After receipt of the above described letter, Plaintiff made inquiries of various persons at IBM to determine if there were any open positions or placement opportunities for for which he might apply, in the hope of finding placement, as described in defendant IBM's letter.

14(C)

Plaintiff continued to be employed fulltime at IBM until

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[3] Paragraphs 14(A) through 14(D) were added by a court authorized amendment. (R., pp.58-60)

November 30, 1994.

14 (D)

During the period of time from receipt of letter described above until his termination on November 30, 1994, Plaintiff continued to work full time at IBM, receiving his full pay and full benefits.

15.

Defendants' decision to remove Plaintiff from this field managerial position to a position in which he had no knowledge or experience and further, to replace Plaintiff as a Field Manager with a Caucasian evidences that Plaintiff's termination was not for reasons of "downsizing", but rather, was racially motivated.

16.

Plaintiff's termination was discriminatory in nature, especially when considered in light of the course of IBM's practices and treatment of black employees in the New Orleans area, and its treatment of Plaintiff in particular. Plaintiff alleges that the single and sole reason for his discharge was pretexual and discriminatory.

ARGUMENT AND REASONS FOR GRANTING THE WRIT

The Fifth Circuit Court Of Appeals Erred By Not Certifying The Question Of When Prescription Begins Under La. Rev. Stat. 23:1006 *et seq.* To The Louisiana Supreme Court For Its Decision, Given The Unresolved Nature Of Louisiana Law On The Matter.

As stated by the Fifth Circuit in 6its November 21, 1996 decision, "the narrow question on appeal is whether a cause of action for race discrimination under La. Rev. Stat. §23:1006, §51:2242 and §51:2256 arises when an employee has notice of termination or on the last day of employment." (See Appendix, page 3.)

Under the doctrine set forth in **Erie Railroad Company v. Thompson**, 304 U. S. 64 (1938), state law is applicable in a removed federal diversity case such as the instant one. To date, however, the Louisiana Supreme

Court has not addressed the prescription issue raised via a Rule 12 (b) (6) motion by the defendants in Mr. Foster's case.

In such instances, state intermediate appellate court decisions constitute indicia of state law and must be given due consideration. **Lavespere v. Niagra Machinery and Tool Works, Inc.**, 920 F. 2d 259, 160 (5th Cir. 1990). The Fifth Circuit failed to do so as will be set out more particularly below.

When the Fifth Circuit Court of Appeals first considered at what point prescription commences in cases filed under Louisiana state anti discrimination statutes in 1988 and 1989, the court could find no state appellate court decisions on the issue and it decided to look to federal jurisprudence for an answer. **Williams v. Conoco, Inc.**, 860 F. 2d 1306, 1307 (5th Cir. 1988) and **Jay**

v. International Salt Co., 868 F. 2d 179, 180-81 (5th Cir. 1989). As a result, the Fifth Circuit held that prescritpion began to toll in a Louisiana state statute based employment discrimination case at the time an employee received notice of an adverse employment action against him/her.

Since 1992, Louisiana federal district courts have looked to and relied upon the Louisiana Third Circuit Court of Appeal's decision in **Winbush v. Normal Life of Louisiana**, 599 So. 2d 489 (La. App. 3rd Cir. 1992) In **Winbush**, the appellate court specifically ruled that the prescriptive period began to run at the time of notice rather than the point at which the full consequences of the adverse employment action are felt by the employee in a race discrimination case filed under Louisiana state statutes.

In affirming the district court

judgment and dismissing Mr. Foster's case on a Rule 12 (b)(6) motion, the Fifth Circuit continued to rely on **Winbush**, even though that case has now been reversed by the very Louisiana appellate court that issued the opinion.

Given that the Louisiana Third Circuit has seen fit to unequivocally overrule its holding in **Winbush**, *supra*, it was error for the Fifth Circuit to continue to rely on a reversed Louisiana case now recognized to be "erroneous" rather than follow the "better, more rational and fairer rule at law," **Harris v. Home Savings and Loan Association**, 663 So. 2d 92, 95 (La. 1995); writ denied 664 So. 405 2d (La. 1995). If the Fifth Circuit did not feel confortable with the **Harris** decison's repudiation of earlier state appellate jurisprudence, then it should have found at the least that Louisiana law on the issue was

unclear and certified the question to the Louisiana Supreme Court for its resolution.

The Fifth Circuit Court Of Appeals Also Erred In Holding That The Harris Decision Was Distinguishable On Its Facts From the Situation In Mr. Foster's Case.

The Fifth Circuit also reasoned that Hugh Foster's case should not be affected by the **Harris** decision because "nothing in [Mr. Foster's] letter [from IBM] gave hope of another position in the company being available." (Appendix, p. 8) Petitioner believes this finding is in error in light of the fact that that the letter sent by IBM to Foster advised:

> "while internal placement opportunities may be undertaken, opportunities for placement within IBM are expected to be very limited. You do not have the option of assuming a job that would displace another IBM regular employee."

Contrary to the Fifth Circuit's holding, Petitioner believes that this document provided Mr. Foster's case with something more than the "mere continuity of employment" found to be insufficient to prolong the life of a federal cause of action for employment discrimination in **Delaware State College v. Ricks**, 449 U. S. 250 (1980).

In addition, when the Louisiana Third Circuit Court of Appeal overruled its holding in **Winbush**, it did not limit its application to **Harris** only. To the contrary, the court specifically stated that the **Winbush** decision - which explicitly addressed a suit under La. Rev. Stat. 23:1006 *et seq.* - (the same statute involved in Mr. Foster's case) was "erroneous."

Even if this Honorable Court were to decide that the **Harris** decision, which was found by the district court to be

"directly on point and indisputably in [plaintiff's] favor" (page 2 of the Judgment entered into the Record on January 30, 1996) does not compel that the Defendants' Second Motion to Dismiss be denied, despite Plaintiff's argument to the contrary, the Amended Petition filed herein also mandates that the second Motion to Dismiss on the grounds of prescription on the face of the Complaint be denied.

Contrary to the representation by Defendants in their Second Motion to Dismiss, that "the Amended Complaint doesn't even allege that Foster invoked or participated in an "internal placement activities" (page 9), paragraph 14B of the Plaintiff's Amended Petition specifically states:

> After receipt of the above described letter, plaintiff made inquiries of various persons at IBM to determine if

> there were any open positions or placement opportunities for which he might apply, in the hope of finding placement, as described in defendant IBM's letter.

Under these circumstances, even without the benefit of the **Harris** decision, the one (1) year prescriptive period would not start to toll until the time for undertaking internal placement activities expired which would not be until November 30, 1994,

Petitioner Requests That This Honorable Court Certify The Question Raised Herein To The Louisana Supreme Court For Its Resolution In Accordance With The Provisions Of Rule XII Of The Rules Of The Louisiana Supreme Court.

As set forth on pages 6 and 7 of this Application for Writ of Certiorari, Rule XII of the **Rules of the Louisiana Supreme Court** provides that this Honor-

able Court may certify a question to the Louisiana Supreme Court for its consideration. Petitoner respectfully submits that such a course of action would be appropriate herein given the circumstances and he suggests that the question should be certified as follows:

> At what point does the one year prescriptive period commence to run in a race discrimination case filed under La. Rev. Stat. §23:1006, §51:2242 and §51:2256?

CONCLUSION

Motions to Dismiss are not favored by law and "are rarely granted." Wright & Miller, **Federal Practice and Procedure: Civil** §1357 at 598. The Fifth Circuit has expressed its trepidation about granting such motions, noting in **Barber v. Motor Vessel "Blue Cat"**,

372 F. 2d 626, 627 (5th Cir. 1967) that dismissing a claim on the basis of barebones pleadings is "a precarious disposition with a high mortality rate."

In the instant matter, the **Winbush** decision, *supra*,, upon which the Fifth Circuit has previously relied to hold that prescription under the Louisiana state anti discrimination statute begins at the time of communication of the forthcoming adverse action rather than at the point when the adverse employment action actutally occurs, has been explicitly repudiated in **Harris v. Home Savings and Loan Association**, *supra*, by the very same state circuit court.

Accordingly, it is submitted that the it light of the **Harris** decision, the Fifth Circuit Court of Appeal should have ruled in favor of Petitioner and/or certified a question to the Louisiana Supreme Court on the point at which pre-

scription begins to toll under the Louisiana state anti discrimination statutes rather than decide the matter itself.

For the foregoing reasons, Petitioner Hugh Foster respectfully requests that a Writ of Certiorari be issued to review the judgment below.

In the alternative, Petitioner respectfully requests that this Honorable Court certify the following unresolved question of Louisiana law to the Louisiana Supreme Court for resolution:

> At what point does the one year prescriptive period commence to run in a race discrimination case filed under La. Rev. Stat. §23:1006, §51:2242 and §51:2256?

Respectfully submitted,

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Hugh Foster

Dated this 26th day of February 1997.

IN THE UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

No. 96-30481
Summary Calendar

HUGH FOSTER,

Plaintiff-Appellant,

versus

INTERNATIONAL BUSINESS MACHINES CORPORATION; DENNY SLAYTON,

Defendants-Appellees.

Appeal from the United States District Court for the Eastern District of Louisiana (95-CV-3456-N)

Before GARWOOD, JOLLY, and DENNIS, Circuit Judges.

PER CURIAM:*

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*Pursuant to Local Rule 47.5, the court has determined that this opinion should not be published and is not pprecedent except under the limited circumstances set forth in Local Rule 47.5.4.

In this removed, diversity-based employment case, the plaintiff, Hugh Foster, appeals the district court's dismissal of his case under Rule 12 (b) (6) on grounds that it was prescribed by the applicable state statute of limitation.

We review Rule 12(b) (6) motions de novo. Cinel v. Connick, 15 F. 3d 1338, 1341 (5th Cir.), cert. denied, 115 S. Ct. 189, 130 L. Ed. 2d 122 (1994). For the reasons detailed below, the district court is affirmed.

I.

Mr. Foster contends that in 1993 and 1994 his employer, IBM, discriminated against him on the basis of race. This discrimination is alleged to have culminated on September 22, 1994, when IBM notified Foster he was fired. Foster's last day of work with IBM, however, was November 30, 1994. He filed

this lawsuit on September 29, 1995.

The district court held that Louisiana's one-year statute of limitations barred the complaint, determining that the cause of action arose on September 22, 1994, the date Foster learned of his dismissal. In contrast, Foster contends that the cause of action arose on his last day of work, November 30, 1994, and his complaint, therefore, was filed in a timely manner. Thus, the narrow question on appeal is whether a cause of action for race discrimination under La. Rev. Stat. § 23:1006, § 51:2242, and § 51:2256 arises when an employee has notice of termination or on the last day of employment.

II.

A.

In diversity cases, such as this one, federal courts are *obliged to follow*

the state high court's determination of substantive state law issues. When the high court has not spoken to a particular issue, the federal court must attempt to decide how the state high court would rule on the issue. Erie R. Co. v. Tompkins, 304 U.S. 64, 58 S. Ct. 817, 82 L. Ed. 1188 (1938); Walker v. Savell, 335 F. 2d 536, 540-42 (5th Cir. 1964).

Although decisions of state appellate courts are influential, they are not binding upon us when we find that the state's highest court would decide differently. West v. American Telephone & Telegraph Co., 311 U.S. 223, 237, 61 S. Ct. 179, 183, 85 L. Ed. 139 (1940).

B.

In Williams v. Conoco, we concluded that although the Louisiana Supreme Court had not resolved the issue, a cause of action for employment discrimination

cases runs from the date the employee has notice of an adverse action. Williams v. Conoco, Inc., 860 F. 2d 1306 (5th Cir. 1988). In 1992, the Louisiana Appellate Court ruled in a state race discrimination case that the prescriptive period begins to run at the time of notice, confirming the federal court's position. Winbush v. Normal Life of Louisiana, 599 So. 2d 489 (La. App. 3 Cir. 1992). Therefore, at least as of 1992, the question of when a cause of action arises in an employment discrimination case appeared settled.

The plaintiff, however, contends that the recent opinion of Harris v. Home Savings and Loan Assoc. changes everything. Harris v. Home Savings and Loan Assoc., 663 So. 2d 92, 95 (La. App. 3 Cir.); writ denied 664 So. 2d 405 (1995). The court in Harris held that under the facts before it, a claim for

age discrimination began on the date of firing and not from the date of notification. Id. at 94. The plaintiff argues that Harris overruled Winbush. We find that Harris is distinguishable from both Winbush, and from Foster's claim.

Harris involved unusual facts: After working thirty-six years for his employer, Home Savings and Loan notified Harris he was going to lose his job. Rather than simply firing Harris, his employer gave him two options. He could continue with the company for three years at a reduced salary, or he could keep his current salary for one additional year, but lose certain other benefits. Harris chose to continue to work for a single year. He filed his age discrimination complaint a few months after finally leaving the company, but over a year after learning that he would eventually lose his job.

The Harris Court was concerned that in such circumstances, an employee may be forced to choose between continuing to work during a "phase out" period and filing a well-grounded employment discrimination suit. The court noted: "a claimant's cause of action may very well be undermined, if not completely thwarted, by a wily employer who misleads the claimant into believing that ameliorative measures may be taken within a year of notification to prevent a termination and then does nothing to annul the decision to terminate." Id. at 95-96.

The Harris Court's particular take on Delaware State College v. Ricks is illuminating. Delaware State College v. Ricks, 449 U.S. 250, 101 S. Ct. 498, 66 L. Ed. 2d 431 (1980). Ricks, a college teacher who had been denied tenure, claimed he had been discriminated against

based on his national origin. Denial of tenure was the functional equivalence of being fired. Nevertheless, Ricks was permitted to work for more than a year, before being forced to leave. The Supreme Court found that the "unlawful employment practice" occurred when Ricks learned that tenure was denied; the ultimate termination of employment at the end of the following academic year was a consequence of the denial of tenure. Therefore, the Court held, the cause of action arose when Ricks learned of the denial of tenure.

The Harris Court contrasted Ricks with Harris, noting that "Once tenure was denied in Ricks, the damage was done. The intent to terminate Mr. Harris as evidenced by the October, 1992 notice could easily have been annulled before his actual termination." Harris, 663 So. 2d at 95. Therefore, the decision in

Harris, the Louisiana court reasoned, does not apply to circumstances such as those in Ricks where a decision to fire an employee is unequivocally communicated and little or no hope for a reprieve exists.

In contrast, the letter notifying Foster that he was fired was unequivocal. It noted Foster's employment was to end permanently on November 30, 1994. Contrary to Foster's assertions, nothing in the letter gave hope of another position in the company being available. The letter notes that "[w]hile internal placement activities may be undertaken, opportunities for placement within IBM are expected to be very limited. You do not have the option of assuming a job that would displace another IBM regular employee." Therefore, whatever force Harris may have, it is simply not applicable to the case before us.

The district court correctly concluded that in the circumstances before us, Foster's cause of action arose when he was notified that he had been fired. Therefore, the district court opinion is

A F F I R M E D.

Filed: November 21, 1996

UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF LOUISIANA

HUGH FOSTER	*	CIVIL ACTION
VERSUS	*	NO. 95-3456
INTERNATIONAL BUSINESS MACHINES (IBM), et al.	*	SECTION "N"

ORDER AND REASONS

Plaintiff's complaint in this matter alleges employment discrimination in violation of La. Rev. Stat. § 23:1006, § 51:2242, and § 51:2256. Specifically, plaintiff contends that defendant IBM designated him a surplus employee because of his race. On December 14, 1995, the Court found that plaintiff's claims had prescribed and dismissed them with prejudice. According to the complaint, plaintiff was advised on or about September 22, 1994, that he "would be surplussed." He continued to work until November 30, 1994. Citing Fifth Circuit

and Louisiana cases establishing a one-year statute of limitations in employment discrimination cases and holding that the cause of action accrues on the date a plaintiff is notified of the adverse decision, rather than on the date he stops working, the Court dismissed plaintiff's complaint, which was filed on September 29, 1995, as untimely by seven days.

Plaintiff subsequently asked for and was granted leave to amend his complaint. In his amended complaint, he alleged that the letter advising him of his termination also provided that "internal placement activities may be undertaken." He further asserted that he made inquiries of various persons at IBM to determine if there were any open positions or placement opportunities for which he might apply. Shortly after plaintiff was granted leave to amend his complaint, defendants advised the Court

of a recent Louisiana appellate court decision, Harris v. Holmes Savings and Loan Ass'n, 663 So. 2d 92 (La. Ct. App. 3d Cir.), writ denied, 664 So. 2d 405 (1995), holding that a cause of action for employment discrimination under Louisiana law does not accrue until the plaintiff's last day of work. Considering the amended complaint and the possible change in the state of Louisiana law, the Court encouraged defendants to re-urge their motion to dismiss and plaintiff to re-urge his opposition, and directed both parties to address the effect of plaintiff's amendment to the complaint and the weight that should be accorded to the Harris decision on the question of whether plaintiff's claims had prescribed.

The re-urged motion has now been fully briefed by both sides. Defendants contend that Harris is not controlling and/or that its facts are distinguishable

from those of this case. They further contend that plaintiff's efforts to find other work at IBM do not affect the accrual date of his cause of action. Plaintiff, of course, disagrees on both points.

In diversity cases such as this one, federal courts are obliged to make determinations of substantive state law issues in accordance with the precedents of the state's highest court. Erie Railroad Co. v. Tompkins, 304 U.S. 64, 58 S. Ct. 817 (1938). Where the state's highest court has not rendered an opinion as to a particular issue, the federal court's task is to determine how it believes the state's highest court would rule on that issue. See Walker v. Savell, 335 F. 2d 536, 540-42 (5th Cir. 1964); Lone Star Indus., Inc. v. Redwine, 757 F. 2d 1544, 1548 n.3 (5th Cir. 1985); see also 19 Wright & Miller, Federal Practice & Procedure, § 4507, at 89-91.

In making such determinations, the federal courts should consider intermediate appellate court decisions of the state whose law they are applying, but they are not bound by them where they believe that the state's highest court would decide differently. West v. American Telephone & Telegraph Co., 311 U.S. 223, 237, 61 S.Ct. 179, 183 (1940); Green v. Walker, 910 F. 2d 291, 294 (5th Cir. 1990). The Court thus turns to a consideration of how Louisiana's Supreme Court would resolve this issue.

In Williams v. Conoco, Inc. 860 F. 2d 1306, 1307-08 (5th Cir. 1988), the Fifth Circuit held that, under Louisiana race discrimination law, the statute of limitations begins to run as soon as an employee is notified of termination. This holding was extended to Louisiana's age discrimination statute shortly thereafter. Jay v. International Salt Co., 868 F. 2d 179, 181 (5th Cir. 1989).

At the time of the Fifth Circuit's decisions in Williams and Jay, there was no existing Louisiana Supreme Court precedent on point, id. at 1307, nor is there presently. However, two panels of the Louisiana Court of Appeals for the Third Circuit have addressed the issue in the past several years, and have reached opposite conclusions. In Winbush v. Normal Life of Louisiana, Inc., 599 So. 2d 489 (La. Ct. App. 3rd Cir. 1992), the court, relying on Williams, found that a race discrimination case had not prescribed because it was filed within one year of notification of termination. In Harris, a different panel of the same court concluded that Winbush was "erroneously decided" and refused to follow it. Instead, it held that the plaintiff's cause of action for age discrimination did not accrue until his employment actually terminated. Harris, 663 So. 2d at 94-95.

In deciding the issue presented in Williams without guidance from the Louisiana Supreme Court, the Fifth Circuit Court of Appeals cited the frequent reliance of Louisiana's judiciary on federal interpretation of federal law when state statutes track federal ones. Williams, 860 F. 2d at 1307, citing Giroir v. South La. Med. Center, 475 So. 2d 1040, 1042 (La. 1985); Louisiana Power & Light Co. v. United Gas Pipe Line Co., 493 So. 2d 1149, 1158 (La. 1986); Bennett v. Corroon & Black Corp., 517 So. 2d 1245, 1246 (La. Ct. App. 4th Cir. 1987), writ denied, 520 So. 2d 425 (1988); Dawson v. New Orleans Clerks & Checkers Union, 483 So. 2d 249 (La. Ct. App. 4th Cir. 1986). The Williams court held that the Louisiana employment discrimination statutes were similar to the federal ones, and found substantial federal precedent holding that a cause of action under federal employment discrim-

ination statutes accrued upon notification of adverse employment action. See Delaware State College v. Ricks, 449 U.S. 250, 101 S. Ct. 498 (1980), Chardon v. Fernandez, 454 U.S. 6, 102 S. Ct. 28 (1981), and their progency.[1] The Fifth Circuit accordingly held that the Louisiana Supreme Court would apply the same principle to employment discrimination cases brought under Louisiana law.

The court sees no reason to depart from this line of reasoning. The long

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[1]Ricks was a suit under 42 U.S.C. § 1983 against a public institution for national origin discrimination. Chardon was a § 1983 suit alleging discrimination by a public institution on the basis of political beliefs. The principle outlined in these cases has since been extended to claims under Title VII, the Age Discrimination in Employment Act, the Americans With Disabilities Act, and various state employment discrimination laws. See Amburgey, 936 F. 2d 805, 810 (5th Cir. 1991) (ADEA); Williams, 860 F. 2d at 1308 (racial discrimination under Louisiana law); Burfield v. Brown, Moore & Flint, Inc., 51 F. 3d 583, 589 (5th Cir. 1995) (ADA).

line of Louisiana cases tracking federal interpretations of discrimination statutes is a persuasive indication of what the Louisiana Supreme Court would do, notwithstanding a single intermediate appellate court decision which itself notes the similarity between the Louisiana and federal anti-discrimination laws. See Harris, 663 So. 2d at 95.[2]

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[2]Even if the Court were to accept Harris as binding precedent, its facts are distinguishable from the instant case. The plaintiff in Harris was terminated after being presented with two options, one which would have preserved his employment for up to four years and one which continued it for a little over one year. Harris, 663 So. 2d at 94. The court used termination as the relevant measuring point because the plaintiff could have been retained beyond the one-year time period and because the acts of discrimination against him continued while he continued his employment with the defendant. Id. at 95. In this case, the notification letter of September 22, 1994 unequivocally notified Foster of his permanent termination on November 30, 1994. There was no offer of employment extending beyond the prescriptive period, as with Harris, nor was there any indication that his employment would continue, other than the reference to internal placement in the letter. The letter cannot be reasonably construed as

The Court thus holds that, under Louisiana anti-discrimination law, as under federal law, a cause of action accrues on the date an employee is notified that a decision to terminate him has been made, and "mere continuity of employment, without more, is insufficient to prolong the life of a cause of action for employment discrimination." Ricks, 449 U.S. at 257, 101 S. Ct. at 504. Plaintiff contends that the possibility of internal placement activities, and his efforts to take advantage of them, provide the "more" needed to toll the running of the statute of limitations in his case. Although no Louisiana cases have addressed this precise issue, several federal courts have considered

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an offer of alternative employment beyond the November 30, 1994 termination date. Unlike Harris, plaintiff alleges no acts of discrimination subsequent to his receipt of the September 22, 1994 letter. The facts of this case do not warrant a different measuring period for prescription as set forth in Harris.

similar factual scenarios. In Janikowski v. Bendix Corp., 823 F. 2d 945 (6th Cir. 1987), the plaintiff was informed on September 4, 1980, that his employment with the Tax Department of his company would terminate on September 30, 1981. Subsequently, the plaintiff received a memo stating that his position would terminate on September 30, 1981, and that "if on the date of your termination from the Tax Department, you have not secured a position elsewhere within Bendix, you will be terminated from employment." Id. at 946. The plaintiff subsequently searched for employment both inside and outside the company. He was unable to find employment within the company, and his employment terminated on November 30, 1981. He filed age discrimination charges with the EEOC on May 14, 1982, and filed suit under the ADEA on November 28, 1983. After the district court dismissed the federal suit as untimely,

the plaintiff argued that the notification he received was not definite and final, because his employer left open the possibility that he could continue working elsewhere in the company. Id. at 947. Applying Ricks and Chardon, the Sixth Circuit Court of Appeals rejected this argument. In Ricks itself, the Court pointed out, the plaintiff had argued, unsuccessfully, that the limitations period did not begin to run upon notification of the adverse tenure decision because the "letter explicitly held out to Ricks the possibility that he would receive tenure if the Board sustained his grievance." Ricks, 449 U.S. at 260, 101 S. Ct. at 505. Instead, "Ricks held that the cause of action accrued when Ricks received notice that he would be terminated, regardless of whether the letter was equivocal in holding out the possibility that he might receive tenre and thereby avoid

termination." Janikowski, 823 F. 2d at 947.

The Fourth Circuit Court of Appeals reached a similar conclusion where a plaintiff's notice of termination provided that "her temporary assignment was reduced to 90 days at current salary, during which time she could search for and bid on available positions elsewhere in the facility for which she was qualified, and if she had not secured a suitable permanent position by the end of her temporary assignment, she was to be involuntarily placed on lack of suitable work status." English v. Whitfield, 858 F. 2d 957, 959-60 (4th Cir. 1988). Rejecting the plaintiff's argument that the decision "did not have the final and unequivocal quality reguired" to start the running of the statute of limitations, the Fourth Circuit noted that "the notice of the challenged employment decision itself was in form

final and unequivocal. There was no intimation in it that the decision was subject to further appeal, review, or revocation, either in whole or in part. Neither did it state or imply that her temporary assignment might be lengthened or made indefinite in duration." Id. at 962. Accordingly, it was sufficient to start the running of the statute of limitations.

Other federal courts have reached the same conclusion when addressing similar situations. See Chester v. American Telephone & Telegraph Co., 907 F. Supp. 982, 986 (N.D. Tex. 1994) (notification which advised plaintiff he could apply for other positions within the company but would be terminated in sixty days if he did not find one sufficient to start limitations period running); Amburgey v. Corhart Refractories Corp., 936 F. 2d at 810-11 (situation in which an employee is

terminated but told to "keep in touch" is different from one in which an employer misled or concealed facts from an employee); Gustovich v. AT & T Communications, Inc., 972 F. 2d 845, 847 (7th Cir. 1992) (limitations period began to run on the date the employees were told they were "surplus" and would be terminated unless they found employment elsewhere in the company).

The Court sees no reason to doubt that the Louisiana Supreme Court would rely on this line of federal precedent and hold that the accrual date of plaintiff's cause of action was not affected by his efforts to find other employment at IBM. Accordingly, plaintiff's cause of action accrued on the date he received the letter notifying him he was being "surplussed," September 22, 1994. His suit, which was filed on September 29, 1995, was untimely.

IT IS ORDERED that defendants' Motion to Dismiss for Failure to State a Claim is hereby GRANTED.

New Orleans, Louisiana, this 22 day of April, 1996.

EDITH BROWN CLEMENT
UNITED STATES DISTRICT JUDGE

(2)

Supreme Court, U.S.
FILED
JUN 6 1997
OFFICE OF THE CLERK

No. 96-1909

IN THE

Supreme Court of the United States

OCTOBER TERM, 1996

HUGH FOSTER,

Petitioner,

v.

INTERNATIONAL BUSINESS MACHINES CORPORATION and DENNY SLAYTON,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

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BRIEF FOR RESPONDENTS IN OPPOSITION

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BRIEF FOR RESPONDENTS IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1-10) is unpublished. *See* Pet. App. 1 n.*. The successive opinions of the district court—dismissing the case, permitting amendment of the complaint, and again dismissing the case after amendment—are not reported in Federal Supplement, but they may be found, respectively, at 1995 WL 747476, 1996 WL 37776, and 1996 WL 194938.

JURISDICTION

The judgment of the court of appeals was entered on November 21, 1996. On February 19, 1997, petitioner requested, and on February 20, 1997, Justice Scalia granted, an extension of time for the filing of a certiorari petition, to and including February 26, 1997. *See* 28 U.S..C § 2101(c); S. Ct. Rule 30.2. A petition was filed on February 26, 1997 (and docketed, after resubmission, three months later). This Court has jurisdiction under 28 U.S.C. § 1254(1).

STATEMENT

Petitioner Foster was an employee of respondent IBM, working under the supervision of respondent Slayton.* According to the complaint in this case, IBM demoted petitioner in early 1994 and then, on September 22, 1994, notified him that he was being discharged, with his last day of work to be November 30, 1994. *See* Pet. App. 2; Pet. 15-16. Petitioner filed this suit under Louisiana law, alleging racial discrimination, on September 29, 1995. Pet. App. 2-3. Petitioner thus filed his suit more than one year after the notice of discharge, even though the well-established judicial decisions in the area (both federal and state) had clearly held that such an action was governed by Louisiana's one-year statute of limitations and that the state-law period, like its federal Title VII counterpart, began to run upon the notice of discharge, the last alleg-

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* Pursuant to Rule 29.6 of the Rules of this Court, IBM states that it has no parent company and that it owns less than 100% but at least 10% of Object Design Inc.

Although the caption of the petition names Denny Slayton as a respondent, petitioner did not include Slayton on the Certificate of Interested Persons in his court of appeals brief, thus (despite the "*et al.*" after IBM in the caption on that brief) apparently excluding him from the case in the Fifth Circuit. *See* S. Ct. Rule 12.6 (only "parties to the proceeding in the court whose judgment is sought to be reviewed" are respondents in this Court). The Fifth Circuit had no occasion to decide Slayton's status.

edly discriminatory act. *See Jay v. International Salt Co.*, 868 F.2d 179, 180-81 (5th Cir. 1989); *Williams v. Conoco, Inc.*, 860 F.2d 1306, 1307-08 (5th Cir. 1988); *Winbush v. Normal Life of Louisiana*, 599 So. 2d 489, 491 (La. App. 3d Cir. 1992); *see also Chardon v. Fernandez*, 454 U.S. 6 (1981) (Title VII); *Delaware State College v. Ricks*, 449 U.S. 250 (1980) (Title VII).

After removal to the United States District Court for the Eastern District of Louisiana, which possessed diversity jurisdiction, respondents moved to dismiss the suit as out of time. The district court granted the motion in December 1995, relying on the foregoing precedents. *Foster v. IBM*, 1995 WL 747476. In January 1996, the district court permitted petitioner to amend his complaint to add the fact that the notice of discharge had stated: " 'While internal placement activities may be undertaken, opportunities for placement within IBM are expected to be very limited. You do not have the option of assuming a job that would displace another IBM regular employee.' " Pet. App. 9; *see Foster v. IBM*, 1996 WL 37776. Based on the amended complaint, petitioner was permitted to reargue the timeliness of his suit, now relying on a more recent state-court decision, *Harris v. Home Savings and Loan Assoc.*, 663 So. 2d 92, 95 (La. App. 3d Cir.), *writ denied*, 664 So. 2d 405 (La. 1995).

Upon a renewed motion to dismiss, the district court again held the complaint untimely. *Foster v. IBM*, 1996 WL 194938. The court concluded that *Winbush*, *Williams*, and *Jay* stated the applicable law and that *Harris* presented unusual facts rendering it inapplicable here. The court relied on a number of additional federal-court decisions reaching a similar conclusion (under Title VII) where an employer issues a notice of discharge that does not qualify the firing except to refer to the possibility of placement elsewhere in the company. *Id.* at *2-*4. The court distinguished *Harris* on the ground that the employee in *Harris* had been offered and actually accepted continued

employment for more than an additional year after being notified that he would eventually lose his job, whereas petitioner's notice of imminent discharge was unequivocal, because the "placement" language was not an offer of further employment. *Foster,* 1996 WL 194938 at * n.2.

The court of appeals, in an unpublished decision, affirmed without dissent. Pet. App. 1-10. Like the district court, the Fifth Circuit found that *Harris* was distinguishable on its "unusual facts" and hence that the state-law limitations issue in this case was governed by the notification rule of *Williams, Jay,* and *Winbush.* Pet. App. 6. The court read *Harris* as resting on the peculiar fact that the employee was not unequivocally fired, but instead placed in a limbo subject to the employer's manipulation if the one-year limitations period had begun to run upon the initial notice. In particular, the *Harris* employer, rather than firing the employee outright, made an offer, which the employee accepted, of more than one year's continuation of employment; in those circumstances, the employee had good reason to believe that employment might be extended still further and, therefore, to refrain from suing for the entire year after his initial notice—with the result, if no further employment was in fact forthcoming but the one-year clock had already run, that the employee would have lost his remedy. Pet. App. 6-9. In this case, by contrast, the court of appeals concluded that "the letter notifying Foster that he was fired was unequivocal," the termination date was only two months later (so there was no impediment to suing within the one-year period after leaving the company), and the above-quoted language about the possibility of internal placement did not "g[i]ve hope of another position in the company being available." *Id.* at 9. Accordingly, the court of appeals held that this case is governed by the general rule starting the statute of limitations when clear notice of discharge was given. *Id.* at 9-10.

ARGUMENT

The decision of the court of appeals is an unpublished ruling on an issue of state law. It raises no issue of general importance, and it does not conflict with decisions of this Court or of any other court. The grounds for review raised by petitioner lack merit. The petition should be denied.

Petitioner primarily contends that the Fifth Circuit should have certified the question of when the clock begins to run under Louisiana law on the state-law cause of action for discrimination. Pet. i, 17-21. This contention should be rejected. At no point did petitioner make any request for certification of this state-law question in the district court or in the court of appeals. Nor did either court make any pronouncement or other ruling as to certification. A question not raised or decided in the lower courts is not a suitable candidate for review. *See, e.g., Sisson v. Ruby,* 497 U.S. 358, 359 n.1 (1990); *Delta Air Lines, Inc. v. August,* 450 U.S. 346, 362 (1981); *Youakim v. Miller,* 425 U.S. 231, 234 (1976).

This case presents no occasion for an exception to that important rule—or for what amounts to the same thing, *de novo* certification by this Court (as petitioner requests, *see* Pet. i-ii, 24-25). Certification of a state-law issue is a matter of discretion for the federal courts, based on various considerations, including the federal courts' own ability to resolve the issue in a principled rather than conjectural way, the delay and expense caused by the diversion of the case to another court, and any special need for authoritative finality on the particular state-law issue. *See Lehman Bros. v. Schein,* 416 U.S. 386, 391 (1974); *id.* at 394 (Rehnquist, J., concurring); *Florida ex rel. Shevin v. Exxon Corp.,* 526 F.2d 266, 274-75 (5th Cir.), *cert. denied,* 429 U.S. 829 (1976); 17A C. Wright, A. Miller, & E. Cooper, *Federal Practice and Procedure 2d* § 4248, at 157-79 (1988). The last-minute request for certifica-

tion in this case, coming only after petitioner had forced two federal courts to expend effort to resolve the state-law question and lost, presents the weakest possible claim for certification. All four judges—in a circuit that is thoroughly familiar with certification (*see id.* at 176 (Fifth Circuit has "by far the greatest experience" with certification)) and with the law of the State at issue—were able to resolve the Louisiana-law question in an undeniably principled fashion. And there is no special need for authoritative state-court resolution of the statute-of-limitations question: litigants in petitioner's position have it entirely within their power to avoid any adverse impact by filing in accordance with the earlier filng date, as petitioner could have done by filing one week sooner.

Petitioner cites no precedent for certification in circumstances like this. Virtually all, if not all, certifications directly by this Court have occurred in cases where this Court already had before it a federal-law issue of independent importance, such as the constitutionality of a state law or practice, and authoritative interpretation of state law might have altered or eliminated the federal issue. *See* R. Stern, E. Gressman, S. Shapiro, & K. Geller, *Supreme Court Practce* § 9.4, at 457-60 (7th ed. 1993). The Court in *Lehman Bros. v. Schein, supra*, made clear that certification also is available in a diversity case, but *Lehman* is no precedent for what petitioner requests. In *Lehman*, certification had been sought in the court of appeals, which had simply taken too narrow a view of the availability of that procedure; the underlying state-law issue of corporate fiduciary duties was broadly important, involved the law of a State (Florida) distant from the federal forum (in New York), and could not have been avoided by the plaintiff; and even in those circumstances, this Court did not itself order certification, but merely clarified the availability of certification and remanded for the court of appeals to exercise its discretion under the clarified standards. 416 U.S. at 389, 391-92. *Lehman* is

thus no precedent for this Court's certification in the present case.

Finally, to the extent that the petition might be read, despite the limited questions presented (Pet. i-ii), to raise the underlying question of state law (*see* Pet. 21-24), the case does not warrant review. The court of appeals, like the district court, carefully carried out its federal-law obligation to determine the governing state law by analyzing the pertinent state-law precedents. Accordingly, all that remains is a dispute over the right answer to the state-law question. But the resolution of that question by all four judges below—that *Harris* was an unusual case distinguishable from the principal authority of *Winbush, Williams,* and *Jay*—is unquestionably a reasonable reading of Louisiana law, one that is fully in accord with Title VII law on the point. The state-law question, as to which this Court would give the Fifth Circuit deference (*see McMillian v. Monroe County,* No. 96-542 (June 2, 1997), slip op. 5) and which this Court cannot settle with finality, is not an appropriate matter for this Court's use of its resources. *See* S. Ct. Rule 10(a); *Huddleston v. Dwyer,* 322 U.S. 232, 237 (1944); R. Stern, E. Gressman, S. Shapiro, & K. Geller, *supra,* § 4.2 at 165-66, § 4.10, at 181-84.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

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June 9, 1997